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CRIMINAL DOCKET.

TITLE OF CASE

ATTORNEYS

THE UNITED STATES

vs.

CLIFFORD H. DAVIS

WILLIAM MOORE PEGRAM

VERN MAC THOGMARTIN

For U. S.:

**H. M. RAY, U. S.
Atty., Oxford, Miss.**

For Defendant:

**PAUL M. MOORE,
Calhoun City, Miss.
(Ct. Apptd. for Deft.
Davis)
Ct. Apptd. L. G.
Farr, Holly Springs,
Miss.—for deft.
Pegram**

**Commr.'s Docket No. 1, Cases 47,
48, 49, 50, 51 & 52.**

**Violation of Title 18, § 2 and 2113
(a) and Title 15 § 902(e)**

DATE

PROCEEDINGS

11-11-67 Filed Commissioner's Warrant of Arrest and complaint for each defendant.

Filed Commr.'s Temporary Commitment for each defendant.

11-13-67 Placed in file Plaintiff's Exhibits 1, 2, 3 & 4 filed by Commissioner Lewis.

Entered order fixing bail for each deft. at \$10,000.00 in cases Commr. No. 50, 51 and 52.

11-17-67 Entered Order, signed by Commissioner Lewis, as to all defts. fixing bail at \$40,000 in Commr. cases 47, 48 and 49.

1-17-68 Filed Affidavit of Financial Status and Order Appointing Counsel-Paul M. Moore, Calhoun, City, Miss. (atty for Deft. Davis). Mailed certified copies of the above to Hon. Parham Williams, Law School, University, Miss., U. S. Atty. and U. S. Prob. Serv., deft., Ct. appt'd Counsel and Admin. Office.

1-30-68 Filed Record of Grand Jurors concurring in restricted file.

Filed Indictment (2 counts)

2-7-68 Mailed Notice of Arraignment, set for 2-15-68 at 9:00 A. M. in Oxford, to defts. Davis and Pegram, Hon. Paul M. Moore, Atty. for Davis, U. S. Attorney, U. S. Prob. Serv., and United States Marshal.

Mailed defts. Davis and Pegram a letter explaining the purpose of arraignment day.

2-15-68 Defendant Davis entered Plea of Not Guilty before Judge Claude F. Clayton.

3-6-68 Filed Motion Of Defendant, Clifford H. Davis For The Production Of Transcript Of Grand Jury Proceedings In Said Cause, And For Prosecution To Furnish Other Information.

3-6-68 Filed Motion to Quash Indictment And Discharge Defendant Clifford H. Davis.

3-6-68 Filed Motion For Severance Of Defendants And Separation Of Counts For Trial.

3-6-68 Mailed copies of the above three Motions to Judge Clayton at Tupelo.

3-8-68 Re: Clifford Davis—Entered Plea of Not Guilty—Given 30 days to file motions.

3-21-68 Filed Court Reporter's Transcript of proceeding had on 2-15-68 and 3-8-68. (Gordy)

3-21-68 Filed Court Reporter's Transcript as to all defendants present on 2-15-68. (Gordy)

3-30-68 Filed Response of United States To Motion Of Defendant, Clifford H. Davis, For Production of Transcript of Grand Jury Proceeding In Said Cause, And For Prosecution To Furnish Other Information. Mailed copy to Judge Clayton.

3-30-68 Filed Response of United States To Motion of Defendant, Davis, For Severance And Separation

- tion of Counts For Trial. Mailed copy to Judge Clayton.
- 4-15-68 Mailed Notice of Trial set for Monday, May 6, 1968, to all counsel of record.
- 5-1-68 Filed Response of United States of Motion of Defendant, Clifford H. Davis, to Quash Indictment and Discharge Defendant, Clifford H. Davis.
- 5-6-68 Filed Stipulation-refused by attorney for Davis.
- 5-6-68 Filed Jury Panel for Clifford Davis.
- 5-8-68 Filed Government's Proposed Instruction No. 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20.
- 5-8-68 Filed Defendant's Proposed Instruction No. 1, & 2.
- 5-8-68 Filed Jury Verdict on Clifford H. Davis—"We, the Jury, find the defendant, Clifford H. Davis, Guilty as charged in Count One of the Indictment."
- 5-21-68 Filed Motion on Behalf of Defendant Clifford H. Davis for New Trial. Handed copy of same to Judge Keady's secretary.
- 5-24-68 Filed Order for Dismissal on Clifford H. Davis dismissing Count 2 of the Indictment.
- 5-24-68 Filed Notice of Appeal for Deft. Davis. Mailed copy to H. M. Ray. MB27, p. 459.
- 5-24-68 Filed Application to proceed without prepayment of costs, Affidavit in Support Thereof, and Order for Defendant Davis.
- 5-24-68 Entered Order for Def. Davis. MB27, page 460.
- 5-24-68 Entered Judgment and Commitment for Def. Davis-MB27 p. 462.
- 5-27-68 Filed Court Reporter's transcript of proceedings held before Judge Keady, 5-24-68. Davis.
- 5-28-68 Mailed Statement of Docket Entries with a copy

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of Pauper Affidavit & Order as to Def. Davis to Clerk's Office, U. S. Court of Appeals, Fifth Circuit, N. O., La.

5-29-68 Mailed xerox copy of Notice of Appeal as to Deft. Clifford H. Davis, with copy of Order Appointing Counsel, to Clerk, U. S. Circuit Court of Appeals, Fifth Circuit, New Orleans, La.

5-29-68 Re: Deft. Clifford H. Davis—Filed Voucher, submitted by Atty. Paul M. Moore in the sum of \$638.52, approved by Judge Keady on May 28, 1968. Forwarded the original with copy of Order Appointing Counsel to Administrative Office for payment.

6-4-68 Entered Order granting deft. Davis copies of the transcripts of the proceedings at which he was arraigned and sentenced, signed by Judge Keady, in MB 27, pp. 466-67. Mailed certified copy of order to Mrs. Elizabeth Evans, Official Ct. Reporter. Mailed Notice of Entry of above order to Paul Moore and H. M. Ray.

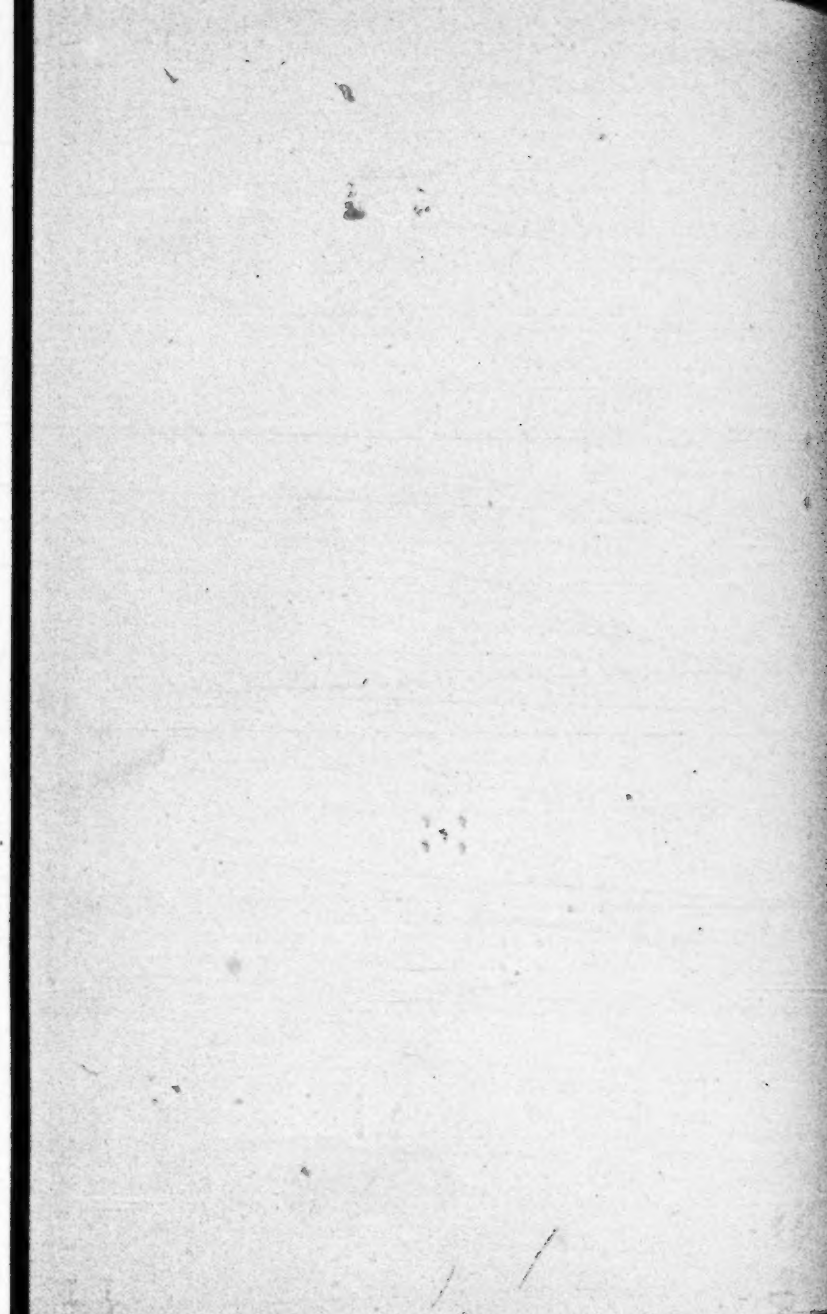
6-20-68 Re: Clifford H. Davis: Received and placed letter in jacket file to Judge William C. Keady, dated 6-7-68, from Deft. Davis.

6-27-68 Received and Entered Order granting court reporter additional time to prepare transcript in MB 27, page 407. Mailed Notice of entry and cert. copy of Order to Elizabeth Evans and Clerk, US Court of Appeals. Notice sent to US Atty. & Atty. Moore

8-2-68 Re: Clifford H. Davis: Filed court reporter's transcript of proceedings, the original & copy, had at Oxford before Chief Judge William C. Keady, on May 6 & 7, 1968; at 9:00 a.m. and May 8, 1968 at 8:30 a.m. (Three volumes) (Elizabeth Evans)

8-5-68 Entered Order, signed by Judge Keady on Aug. 2, 1968, extending the time for filing the record on appeal for an additional 14 days. M. B. 27, pg. 490.

- 8-5-68 Mailed Notice of entry of Order to H. M. Ray, U. S. Attorney & Paul Moore, Court appointed attorney. Mailed copy of order to Mrs. Elizabeth Evans, Court Reporter, Clarksdale, Miss. Certified copy of order mailed to Clerk, U.S. Court of Appeals, Fifth Circuit, New Orleans, La.
- 8-13-68 Record on Appeal, with Exhibits, three volumes of Court Reporter's transcript, mailed to Clerk, U. S. Court of Appeals, Fifth Circuit, New Orleans, La. in two parcels by registered mail—Receipts # 165 & 166. Re: Clifford H. Davis.
- 9-24-68 Received Exhibits from U. S. Court of Appeals, Fifth Circuit. Exhibits were mailed in re. to Clifford H. Davis. Exhibits needed for Trial.
- 10-10-68 Issued Writ on defts. Davis and Pegram.
- 7-15-71 Filed Copy of letter from Clifford Davis to Elizabeth Evans requesting parts of his transcript. He asked that this letter be filed.
- 1-19-71 Filed Motion to Dismiss Indictment.
Filed Motion for Discovery and Inspection.
- 3-17-71 Filed Response.
- 3-25-71 Filed Traverse.
- 6-16-71 Filed Memorandum Opinion.
Entered order signed by Judge Keady on June 14, 1971 ordering that Motion of Clifford Davis to Vacate Sentence Be and the Same is Denied.
- 7-7-71 Filed Notice of Appeal
- 3-8-72 Filed Opinion of the Fifth Circuit Court of Appeals, dated January 20, 1972.
Filed Judgment issued as Mandate on March 6, 1972—Order of District Court.



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CLIFFORD H. DAVIS,

PETITIONER

VS

UNITED STATES OF AMERICA

C.R.W. 6835
Civil WC 71-2-K

MOTION TO DISMISS INDICTMENT—filed January 19, 1971

Comes now the petitioner, *Clifford H. Davis* pro-se, and moves this Honorable Court pursuant to title 18 U.S.C.A. Section 2255, to enter an order dismissing the indictment (C.R.W. 6835) returned by the Grand Jury setting at Greenville, Mississippi, January 30, 1968, as being an unconstitutional array, inasmuch as it did not meet the mandatory requirement of the statute laws set forth by the United States Congress in title 28, U.S.C.A. Section 1861, 1863, 1864, and the 5th amendment of the United States Constitution, to wit:

1.

Petitioner is incarcerated in the United States Penitentiary, Leavenworth, Kansas pursuant to a fourteen (14) year judgment entered in the United States District Court for the North District of Mississippi in violation of 18 U.S.C.A. Section 2113 (A), Sec. 2. "Bank Burglary" conviction was by jury.

2.

Petitioner aver that the proceeding prior to attending the presentment of the indictment C.R.W. 6835 petitioner was arbitrarily deprived of the protection of Sections 1861, 1863 and 1864, title 28 U.S.C.A. in the aforesaid manner prescribed in these sections clause by the jury commissioner and Clerk of Court in preforming their duties.

3.

Petitioner aver that the selection of this Federal Grand Jury setting for the Northern District of Mississippi, Greenville, Mississippi, January 30, 1968, and those prior to the past 20 years has been employed in violation of the 5th amendment due process clause and equal protection therefrom.

4.

Petitioner aver because of the inhereafter reasons in the below averments A, B, C, D, therewithin, the indictment returned against this negro petitioner C.R.W. 6835 on January 30, 1968, must be rendered as void, dismissing said indictment C.R.W. 6835 and any and all orders entered pursuant to said indictment.

(a) that the Grand Jury Array which returned the indictment C.R.W. 6835 was knowingly illegally impounded in violation of the due process of the 5th amendment, which gives equal protection to *All American Citizens* of these United States who are competent, the right and civil duty to seven on the Federal Grand Jury Array. Section 1861.

(b) that the jury commissioner and Clerk of Court for the Northern District of Mississippi for the past 20 years implementing the "Keyman" and "Selectors", system cause nought to token in their selection of prospective qualifying negro jurymen because of their race and color in violation of Section 1863.

(c) that the Northern District Court has by its affirmative action taken for the past 20 years has acquiesced to systematically, purposefully, unlawfully and unconstitutionally excluded the prospective qualified resident negroes from the Grand Jury box in violation of Section 1864.

(d) that the petitioner being a member of the negro race has been prejudiced by the aforesaid violation caused by the violators in carrying out their duties, and has denied petitioner his constitutional right, guaranteed to him by the Sixth Amendment, the right to a fair cross-section of the community.

5.

Petitioner avers he had not waived nor abandoned this right to contest the Grand Jury array as set forth in the Federal Rules of Criminal Procedure Rule 12(B).

6.

Petitioner avers that the court's appointed *Law Student*, who was researching the Grand Jury array question within, was *stopped* from seeing petitioner by the Lafayette County Sheriff, whereas this point of law was lost as to the research necessary to carry the burden which it places upon the "defendant".

7.

Petitioner avers that a timely oral motion was made in open court *before trial* by his Court appointed lawyer, *Mr. Paul M. Moore*, Calhoun City, Mississippi, said motion was then denied by the trial Judge, *Honorable William C. Keady*. Petitioner's counsel did not assign this as error on direct appeal.

WHEREFORE, the petitioner prays that this Court serve notice upon the United States Attorney, grant a prompt hearing thereon with the petitioner present to give testimony to determine the issues by making a finding of facts and conclusions of law and discharge the petitioner for service of the sentence or what other relief the Court deems necessary.

Respectfully submitted,

/s/ Clifford H. Davis

CLIFFORD H. DAVIS-Pro-Se

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CLIFFORD H. DAVIS,

PETITIONER

VS

UNITED STATES OF AMERICA

RESPONDANT

C.R.W. 6835

Civil No.

MOTION FOR DISCOVERY AND INSPECTION—filed January 19, 1971

TO: The United States Attorney:

You are hereby notified that as soon as this motion can be heard by the court *Clifford H. Davis* appearing in propria persona, can be heard in the Courtroom so designed. United States Courthouse, Oxford, Mississippi 38655, petitioner herein make the following motion for discovery and inspection, to include:

That the Court order the United States District Court Clerk, and Jury Commissioner to permit the petitioner to inspect, copy and/or photograph pertinent records of the Grand Jury and general venire providing the following information and/or statistics:

1. Any documents, memorandums or written data sitting forth the course or method used to obtain names of prospective jurors, for the year 1968 and twenty years past.
2. Any documents, memorandums, or written data setting forth the standards of qualifications applied to prospective jurors in compiling the jury list for the Northern District of Mississippi for the year 1968 and twenty years past.
3. Copy of questionnaire mailed to prospective jurors during the year 1968 and for each of the twenty years past.
4. The number of persons on the 1968 jury list and each of the twenty years past.

5. The number of questionnaires mailed to prospective jurors during the year 1968 and for each of the twenty years past.
6. The number of questionnaires returned in 1968 and for the twenty years past.
7. The number of questionnaires carryovers from 1967 jury list and for each of the twenty years past.
8. The number of Negro carryovers from 1967 jury list and for each of the twenty years past.
9. The number of new names added to the list in 1968 and for each of the twenty years past.
10. The number of Negro among the new names added to the jury list in 1968 and for each of the twenty years past.
11. The number of questionnaires returned too late in 1968 and for each of the twenty years past.
12. The number of persons exempted from jury service because of business or occupation in 1968 and for each of the twenty years past.
13. The number of persons exempted from jury service because of age or health in 1968 and for each of the twenty years past.
14. The number of women exempted from jury service because of small children to care for in 1968 and for each of the twenty years past.
15. The number of persons exempted for other reasons (felony conviction, illiteracy, civil service employment, etc.) in 1968 and for each of the twenty years past.
16. From the questionnaires returned in 1968 and for each of the past twenty years, how many were finally selected for the jury list.
17. The number of persons on jury list from Carroll County Mississippi! Negroes on list! Adult population for the year 1960.
18. The number of persons on jury list from Humphreys County, Mississippi. Negroes on list. Adult population of the year 1960.
19. The number of persons on jury list from Leflore County, Mississippi, Negroes on list. Adult population for the year 1960.

20. The number of persons on jury list from Sunflower County, Mississippi. Negroes on list. Adult population for the year 1960.

21. The number of persons on jury list from Washington County, Mississippi. Negroes on list. Adult population for the year 1960.

22. The number of persons 21 years and over residing in the Northern District of Mississippi.

This Motion is urged pursuant to rule 16(b) of the Federal Rules of Criminal Procedure. The particularized need for the foregoing is predicated on the attached Motion to Dismiss the Indictment C.R.W. 6835, said request being both reasonable and material to the petitioner's defense.

In passing on Rule 16(b) motion, there are constitutional imperatives which cannot be disregarded. In a famous and controversial passage, the Supreme Court said:

"We now hold the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to quit or punishment, irrespective of the good faith or bad faith of the prosecution. *Bandy v. State of Maryland* 373 U.S. 83, 104, 10 L Ed 2d 215 83s ct 1194 (1963). There has been much learned debate as to how far the rule thus laid down should go. For the Federal Courts at least, the adoption of amended Rule 16 may make it unnecessary to decide that question. Since Rule 16(b) clearly permits discovery more broadly than due process requires, in doubtful cases courts should grant discovery sought under the rule and avoid the constitutional question. Liberality in passing on discovery motions under this rule also would be consistent with Supreme Courts recognition that disclosure, rather than suppression of relevant materials ordinarily promotes the proper administration of criminal justice. "*Dennis v. United States* 1966. 86 S Ct 1840. 1849. 384 U. S. 855, 869, 16 L Ed 2d 973".

Also see *Mobely v. United States* 379, F 2d 768 5 cir (1967) where the fifth Circuit Court of Appeals in its instructions on remand told the district court to allow Mobely to inspect whatever needed records for Mobely to carry his burden, "commissioner files, etc."

WHEREFORE, in consideration of the foregoing taken in

connection with petitioner's affidavit in support of Motion to Dismiss Indictment, it is prayed that this court will grant motion and thus permit petitioner to effectively carry his burden to Dismiss indictment C.R.W. 6835.

Respectfully submitted,
/s/ Clifford H. Davis
CLIFFORD H. DAVIS, *Pro-Se*
P.M.B. 92164-131
Leavenworth, Kansas

Subscribed and sworn to before me this 11th day of January 1971.

E. J. JOHNSON,
Parole Officer,
United States Penitentiary,
Leavenworth, Kansas

Authorized by the Act of July 7, 1956
administer oaths (18 U.S.C. 4004).

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CLIFFORD H. DAVIS,

PETITIONER

v.

UNITED STATES OF AMERICA,

RESPONDENT

Civil No. WC 712-K

RESPONSE—filed March 17, 1971

Comes now the United States of America by H. M. Ray, United States Attorney for the Northern District of Mississippi, and in response to this Court's order to show cause and in answer to petitioner's motion to vacate judgment and sentence, denies each and every allegation of said motion and alleges that:

1. Petitioner's motion is made pursuant to 28 USC, Section 2255, and this Court has jurisdiction thereof;

2. Petitioner was represented by counsel throughout the proceedings in WCR-6835, including arraignment, jury trial, motion for new trial and appeal to the United States Court of Appeals for the Fifth Circuit, and at no time raised any objection that the grand jury which indicted him was defectively constituted because of the systematic exclusion of Negroes, all of which appears from the records and files, Case No. WCR-6835.

WHEREFORE, respondent prays that the court entertain and determine petitioner's motion without requiring the production of the prisoner at the hearing and that upon the hearing thereof the court deny petitioner's motion for the reason that the motion and files and records of the case conclusively show that petitioner is entitled to no relief.

H. M. RAY

United States Attorney

/s/ ALFRED E. MORETON III

Assistant United States Attorney

CERTIFICATE OF SERVICE (Omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

WESTERN DIVISION

CLIFFORD H. DAVIS,

PETITIONER

vs.

UNITED STATES OF AMERICA,

RESPONDENT

Civil No. W.C. 712-K

TRAVERSE TO RESPONSE PURSUANT TO CIVIL RULES OF PRO-
CEDURE RULE 12—filed March 25, 1971

Comes now the petitioner in his traverse to the govern-
ment response and dispute same as being erroneously
stated and arbitrary cited as a matter of applicable law
governing the factual situation involved within, to wit;

(1). Petitioner consent to paragraph (1) of the response
at true.

(2). Petitioner dispute paragraph (2) inasmuch as to
the statement that petitioner fail to object to the grand
jury array, and the records reflex that no objection appears
from the records and files in Case. No. W.C.R. 6835.

(3). Petitioner dispute respondent memorandum brief
and the case law cited within as being not applicable under
petitioner set of circumstances presented before the Court.

(4). For the Respondent to ask this Court to denied this
admitted timely petition on the first part of a paragraph
of Rule 12(b)(2) Federal Rules of Criminal Procedure on
the waiver clause within, based upon the filed and records
he bring befor the Court without a ful reading of the
entire Rule 12 or a ful evidentiary hearing would ask's
the Court to cause more dispensation to the petitioner
already violated constitutional rights to bring forth before
this Court evidence necessary to carry his burden of proof
of illegality in the selection of the Grand Jury Array for
the Northern District of Mississippi, which indicted this
Negro petitioner.

(5). Petitioner incorporate all filed and record had in
the proceeding of W.C.R. 6835, and calls special attention

to the 6th day of May 1968 and moves this Honorable Court to take judicial notice of his personally knowledge of said day May 6, 1968, whereas the Courts' Reported record will clearly reveal that petitioner Court appointed lawyer. *Mr Paul Moore* raise the defense to the indictment on the precise question within and pursuant to Rule 12(b)(2) whereas the United States Attorney *Mr. H. M. Ray* responded to said oral motion, and *your Honor* who was presiding judge *William C. Keady*, denied said oral motion before trial that day which is the day the Court inform *Mr Paul Moore* that the Court was going to hear and act upon all pre-trial motion in said cause (see Federal Rules of Criminal Procedure Rule 12, (3) (4) (5)).

(6). Petitioner ahereto that Rule 12(b)(2) is binding upon him in pleading said cause, however the entire rule is applicable and must be consider in context and not what the respondent feel is favorable to him. The very next sentence of this Rule 12(b)(2) stated:

"but the Court for cause shown may grant relief from this waiver"

The only answer to the respondent is that the Court set the date and entertain all pre-trial motion as he seen fit. "Rule 12, (3) (4) (5). If this be a mistake respondent should censor the Court, and not the petitioner.

(7). The petitioner respectfully requested that this Honorable Court takes special notices that the respondent only contradiction of petitioner averments comes within a blanket statement that he "denies each and every allegation of said motion." Yet the controversy before this Court is one of whether the Grand Jury Array, seting in the Northern District of Mississippi and those for the past (20) years has been constitutionally selected, free from race discrimination in its choosing prospective qualifying Negro juror's as setfore in *title 28 U.S.C.A. Chapter 121 Juries; Trial by Jury* Section 1861 thought 1874—that the sole issue. If the respondent could answer this question in the affirmative all other thing alledged would be meaningless and superfluous.

The respondent with he wide source of available information does not attempt to justify these arrays nor defend said arrays nor it administertor from the alledges discrimi-

nation tactics used against negro that cause the system to produce the illegal arrays, pursuant to Chapter 121, title 28 U.S.C. Section 1861 thought 1874.

(8). Such a meek response which totally disputations of the main issue involved must be closely consider, if not seen by this Court as to the respondent acquiesce to petitioner contention; surly the respondent response made in paragraph (2) which in its self is an ambiguous statement can not over comes the great weight of factual issue petitioner presented.

The Court may well note, that this black petitioner consented to *no waiver* of rights before the Court, and the Court appointed attorney *Mr Paul Moore* repeatedly objected thought out the trial, from the first day of pre-trial motion hearing to the time the judgment was imposed. Said relief should be granted.

Respectfully Submitted

/s/ Clifford H. Davis

CLIFFORD H. DAVIS-Pro-Se

P.M.B. 92164-131

Leavenworth, Kansas 66408

Dated:

March 22, 1971

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

CLIFFORD H. DAVIS,

PETITIONER

v.

UNITED STATES OF AMERICA,

RESPONDENT

No. WC-712-K

MEMORANDUM OPINION—June 14, 1971

The petitioner, Clifford H. Davis, was, on May 8, 1968, convicted after a trial by jury of entering, together with other persons, aiding and abetting each other, the First National Bank of Hickory Flat, Mississippi, being a branch of the First National Bank of New Albany, Mississippi, the deposits of which were insured by the Federal Deposit Insurance Corporation, with intent to commit a larceny therein, in violation of 18 U.S.C., Sections 2 and 2113(a), and upon his conviction was sentenced to be imprisoned for a term of fourteen years. *United States of America v. Clifford H. Davis*, (CRW 6835 ND Miss.) Pursuant to the sentence of the court petitioner is confined at the United States Penitentiary, Leavenworth, Kansas.

Following petitioner's conviction, his attorney filed a motion for new trial, which was denied. An appeal *in forma pauperis* to the United States Court of Appeals for the Fifth Circuit was allowed and perfected. The Fifth Circuit affirmed. *Davis v. United States*, 409 F.2d 1095 (5 Cir. 1969). Subsequently petitioner filed motions in this court seeking post conviction relief, all of which have been denied. No useful purpose would be served by detailing the substance of those motions, but it should be observed that in none of them was the point upon which petitioner now relies submitted to the court. The same may be said of petitioner's motion for new trial and his appeal to the Fifth Circuit.

Upon request of petitioner, this court, on January 18, 1971, granted him leave to file *in forma pauperis* a motion to vacate his sentence under 28 U.S.C., Section 2255. Respondent was allowed until March 18, 1971, within which

to show cause why the prayer of said petition should not be granted, and petitioner was allowed twenty days within which to file with the court any additional grounds for relief under Section 2255, with the provision that such additional grounds should be deemed waived and forever barred unless filed with the court within said period of time.

On March 17, 1971, respondent filed its response with supporting memorandum brief. On March 25, 1971, petitioner filed his traverse.

The basis for petitioner's motion for relief under Section 2255 is his allegation that procedure followed in selecting the grand jury by which he was indicted resulted in the systematic under-representation of Negroes thereon in violation of petitioner's rights under the Fifth Amendment to the Constitution and of the provisions of 28 U.S.C., Sections 1861, 1863 and 1864.¹ Petitioner is black. Petitioner has alleged no additional grounds upon which he believes himself entitled to relief under 28 U.S.C., Section 2255, and, pursuant to the terms of the court's order of January 18, 1971, any such grounds are hereby found to have been knowingly and intentionally waived by petitioner. In its response, the United States takes the position that petitioner waived any objections to the composition of the grand jury by failure to object before trial, citing Rule 12(b)(2), FRCrP.

After considering the petition, response and traverse, the court invited additional briefs on the question of whether or not petitioner had waived his objections to the composition of the grand jury, and specifically requested discussion of the effect of *Cobb v. Balkcom*, 339 F.2d 95 (5 Cir. 1964) and other relevant cases. Petitioner and respondent filed supplemental briefs on April 20, 1971 and April 21, 1971, respectively.

Before dealing with the issues of law presented by the petition and the government's response, it is necessary to consider a factual issue raised by petitioner which can be

¹ The 1968 amendments to 28 U.S.C., Section 1861, *et seq.*, known as the "Jury Selection and Service Act of 1968" were not applicable to petitioner's indictment or trial, since the grand jury's indictment had been returned and his petit jury impaneled prior to the effective date of the amendments. See note following 28 U.S.C., Section 1861.

fully disposed of by reference to the transcript and files. Petitioner claims that an objection to the composition of the grand jury was made by oral motion of petitioner's attorney and denied by the court before trial in open court on May 6, 1968, the day on which petitioner's trial commenced. He contends, therefore, that there could be no waiver under Rule 12(b)(2) since a proper motion was made before trial. The Court recalls no such oral motion having been made. In order to avoid any possible oversight injurious to the rights of petitioner, the court has read in full the transcript of the proceedings at every stage of petitioner's prosecution and has read the entire jacket file, including docket entries. These voluminous records reveal that not the slightest reference was made to the composition of the grand jury either by petitioner or by his attorney at any stage of the proceedings. Petitioner's attorney did file, on March 6, 1968, a motion to quash the indictment on the ground that the arrest of petitioner was illegal, and that the indictment of the grand jury based upon evidence obtained pursuant to such alleged illegal arrest was void. No reference was made in that motion to the composition of the grand jury. The motion to quash was denied by the court prior to the commencement of trial on May 6, 1968. The substance of the motion was also the substance of the appeal to the Fifth Circuit. *Davis v. United States, supra*. Moreover, petitioner was present at his arraignment on March 21, 1968, at which time his attorney requested and was allowed a period of thirty days within which to file additional pretrial motions. See Rule 12(b)(3) FRCrP. The transcript also reveals that petitioner was present when the motion to quash the indictment on the ground of the alleged illegal arrest was submitted to and denied by the court. The court finds, therefore, that petitioner did not object to the composition of the grand jury prior to trial and did not raise such an objection at any other stage of the proceedings, including his trial, motion for new trial, appeal, nor in his various post conviction motions, until the filing of the petition now before the court.

The Supreme Court in *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822 (1963) held that in a collateral attack upon a state court conviction by way of federal habeas corpus, a criminal

defendant is not to be deemed to have waived a federal constitutional right unless it is determined that the defendant knew of the existence of the right and intentionally relinquished or abandoned it. Such a waiver was there characterized as "... the considered choice of the petitioner." 372 U.S. at p. 439, 83 S.Ct. at p. 849. The same standard was made applicable to federal prisoners in *Kaufman v. United States*, 394 U.S. 217, 89 S.Ct. 1068 (1969). However, neither *Fay v. Noia*, *supra*, involving a petition for habeas corpus relief by a state prisoner, nor *Kaufman v. United States*, *supra*, involving a petition under 28 U.S.C., Section 2255 complaining of the use on trial of evidence obtained by means of an illegal search and seizure, required the Supreme Court to interpret Rule 12, FRCrP, as neither of the cited cases involved the specific type of defect in the proceedings dealt with by the rule.²

In promulgating Rule 12, the Supreme Court provided that objections based on defects in the institution of the prosecution or in the indictment or information must be raised by pretrial motion or they are waived. Exceptions are provided as to jurisdictional defects and the failure of the indictment on its face to charge the defendant with the commission of an offense. The rule vests in the trial

² The pertinent provisions of Rule 12 are as follows:

(b) *The Motion Raising Defenses and Objections.*

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

court discretion to grant relief from the waiver *for cause shown*.

In *Shotwell v. United States*, 371 U.S. 341, 83 S.Ct. 448; reh. den., 372 U.S. 950, 83 S.Ct. 931 (1963), decided at the same term as *Fay v. Noia*, *supra*, the Supreme Court held that under Rule 12(b)(2) a federal criminal defendant who failed to object to alleged defects in the composition of the grand and petit juries before trial waived such objections. The complaints in *Shotwell* concerning jury composition were that the jury commissioner delegated his selection duties to one of his private employees; that volunteers were permitted to serve on the juries; and that the clerk failed to employ a method of selection designed to secure a cross-section of the population. The later ground is virtually identical with the objection raised in the petition here. Because the court is of the opinion that *Shotwell* controls this case, the controlling portions of that opinion are here quoted at length:

"We think, as the two lower courts did, that petitioners have lost these objections by years of inaction. Rule 12(b)(2) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. provides: 'Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. . . . Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver.' Petitioners concede, *as they must*, (emphasis supplied) that this Rule applies to their objection to the grand jury array, but deny that it applies to their objection to the petit jury array. On the latter point we do not agree. In *Frazier v. United States*, 335 U.S. 497, 503, 69 S.Ct. 201, 205, 93 L.Ed. 187, this court stated that a challenge to the method of selecting the petit jury panel comes too late when not made before trial. And the lower federal courts have uniformly held that an objection to the petit jury array is not timely if it is first raised after verdict. See, e.g., *Hanratty v. United States*, 5 Cir. 218 F.2d 358, 359, cert. denied, 349 U.S. 928, 75 S.Ct. 770, 99 L.Ed. 1259;

United States v. Klock, 2 Cir., 210 F.2d 217, 220; Higgins v. United States, 81 U.S. App. D.C. 371, 160 F.2d 222, 223, cert. denied, 331 U. S. 822, 67 S.Ct. 1304, 91 L.Ed. 1839; United States v. Peterson, D.C. 24 F.Supp. 470.

Petitioners have not advanced any reasons for overturning this settled course of decision. Rather, they argue that when public officials violate constitutional rights by actions whose illegality is not readily noticeable by the litigants or their counsel, sufficient cause has been shown to warrant relief from application of the Rule. Ballard v. United States, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181, is said to stand for the broad proposition that technical rules of procedure do not prevent this Court from considering the merits of a basic challenge to the method of jury selection.

In the circumstances of this case, petitioner's contentions are without foundation. In denying the motions the District Court found that the facts concerning the selection of the grand and petit juries were notorious and available to petitioners in the exercise of due diligence before the trial. The same method of selecting jurors in the district had been followed by the clerk and the jury commissioner for years. Inquiry as to the system employed could have been made at any time. Indeed, the acceptance of volunteers for the juries had received publicity in the newspapers, and their presence on the petit jury could have been ascertained at the time it was constituted. And Ballard lends no support to petitioners' position, for in that case the challenge to the jury panel had been timely made and preserved. See 329 U.S., at 190, 67 S.Ct., at 262.

Finally, both courts below have found that petitioners were not prejudiced in any way by the alleged illegalities in the selection of the juries. Nor do petitioners point to any resulting prejudice. In Ballard it was said (at p. 195, 67 S.Ct. at p. 265) that 'reversible error does not depend on a showing of prejudice in an individual case.' However, where as here, objection to the jury selection has not been timely raised under Rule 12(b)(2), it is entirely proper to take absence

of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of that Rule.

We need express no opinion on the propriety of the practices attacked. It is enough to say that we find no error in the two lower courts' holding that the objection has been lost." 371 U.S. at pp. 362-364, 83 S.Ct. at pp. 461-462.

Since the decision in *Shotwell*, the Fifth Circuit has uniformly held that where such objections are not made prior to trial or plea of guilty, they are waived. *Pinkney v. United States*, 380 F.2d 882 (5 Cir. 1967); *Jackson v. United States*, 394 F.2d 114 (5 Cir. 1968); *Brooks v. United States*, 416 F.2d 1044 (5 Cir. 1969); *Bustillo v. United States*, 421 F.2d 131 (5 Cir. 1970); *Throgmartin v. United States*, 424 F.2d 630 (5 Cir. 1970). As observed in the supplemental brief of respondent, only the Ninth Circuit in *Fernandez v. Mier*, 408 F.2d 974 (9 Cir. 1969) has deviated from the line of decisions exemplified by the Fifth Circuit rule. *Fernandez* attempts to distinguish *Shotwell* as involving a direct appeal rather than a collateral attack upon the conviction under Section 2255. The logic of the *Fernandez* opinion is not persuasive, as there appears to be no good reason why an objection should be considered to have been waived if considered on direct appeal, but not waived if considered on collateral attack under Section 2255. In any event, the rule in the Fifth Circuit is otherwise.

Petitioner's objection to the composition of the grand jury is clearly an objection based upon a defect in the indictment within the meaning of Rule 12(b)(2), FRCrP. Since petitioner did not raise his objection by pretrial motion, but raises it for the first time in the petition for Section 2255 relief now before the court, he has waived the objection. Rule 12(b)(2), FRCrP. *Shotwell v. United States*, *supra*. *Pinkney v. United States*, *supra*; *Jackson v. United States*, *supra*; *Brooks v. United States*, *supra*; *Bustillo v. United States*, *supra*; *Throgmartin v. United States*, *supra*.

Cobb v. Balkcom, *supra*, is distinguishable from the case at bar in several important respects. *Cobb* was a collateral attack by way of federal habeas corpus upon a state court conviction and thus did not involve the interpretation of

Rule 12, FRCrP. *Cobb* was also factually exceptional in that the petitioner there was a minor (15 years of age) who had been convicted of murder and sentenced to suffer the death penalty. He had no previous experience in court and had never dealt with a lawyer before. He was not represented by counsel until after he had been indicted. It was conceded in that case that Negroes had for many years been systematically excluded from both grand and petit juries in the county in which Cobb was tried. *Cobb* involved an attack upon the composition of both the grand and petit juries. In its opinion in *Cobb* the Court of Appeals for the Fifth Circuit recognized the distinction drawn in *United States ex rel Goldsby v. Harpole*, 263 F.2d 71 (5 Cir. 1958), cert. den. 361 U.S. 838, 80 S.Ct. 58, 4 L.Ed.2d 78, between grand and petit juries where it is claimed that an objection to the composition thereof has been waived, although the court held that under the facts in *Cobb* the petitioner would not be deemed to have waived his objection to the composition of the grand jury. Ordinarily, an objection to the composition of a grand jury may be held to have been waived under circumstances which would not constitute a waiver of the same objection as to the composition of a petit jury. *United States ex rel Goldsby v. Harpole*, *supra*. There are not present in this case exceptional circumstances such as existed in *Cobb*.

Having concluded that petitioner waived his objection to the composition of the grand jury by failing to timely raise it, there remains only the question of whether or not the court should exercise its discretion to grant relief from the waiver. Rule 12(b)(2) FRCrP. Rule 12(b)(2) permits the court to grant relief from the waiver for cause shown. The Fifth Circuit has indicated in at least two recent decisions that "extraordinary circumstances" must exist before the court should exercise its discretion to grant relief. *Bustillo v. United States*, *supra*; *Throgmartin v. United States*, *supra*. The Supreme Court has indicated that it is proper to consider whether or not the petitioner has suffered actual prejudice in determining whether or not to grant relief. *Shotwell v. United States*, *supra*.

Petitioner offers no plausible explanation of his failure to timely make his objection to the composition of the grand jury. The method of selecting grand jurors then

in use was the same system employed by this court for years. No reason has been suggested why petitioner or his attorney could not have ascertained all of the facts necessary to present the objection to the court prior to trial. The same grand jury that indicted petitioner also indicted his two white accomplices. The case had no racial overtones. The government's case against petitioner was, although largely circumstantial, a strong one. There was certainly sufficient evidence against petitioner to justify a grand jury in determining that he should stand trial for the offense with which he was charged. See *United States ex rel Goldsby v. Harpole, supra*, at 263 F.2d, p. 81. The government did not require the assistance of racial prejudice in order to obtain an indictment against petitioner, and indeed petitioner does not contend that any such prejudice existed. Neither has petitioner suggested the existence of any such exceptional circumstances as would justify relief from the waiver. Petitioner has shown no cause why the court should grant him relief from his waiver of the objection to the composition of the grand jury under Rule 12(b)(2) FRCrP, and, finding no such cause, the court denies such relief.

It cannot realistically be contended in this proceeding that petitioner was not fully aware of his constitutional rights, nor that he was not fully advised in the premises. Petitioner has, in fact, demonstrated an unusually keen awareness of his constitutional rights. He was ably and vigorously represented throughout his trial and on his appeal to the Fifth Circuit by court appointed counsel who demonstrated a high degree of competence and devotion to petitioner's cause. Petitioner's attorney represented him with such distinction that the Court of Appeals for the Fifth Circuit was moved to observe: "We have rarely witnessed a more thorough or more unstinted expenditure of effort by able counsel on behalf of a client." *Davis v. United States, supra*, at 409 F.2d, p. 1101.

The court finds that the motion and the record of the previous proceedings conclusively show that the motion is wholly without merit, and an order will be entered overruling petitioner's motion for vacation of sentence without evidentiary hearing.

This the 14th day of June, 1971.

/s/ William C. Keady

Chief Judge

United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CLIFFORD H. DAVIS,

PETITIONER

vs.

UNITED STATES OF AMERICA,

RESPONDENT

No. WC-712-K

ORDER—June 14, 1971

The motion of Clifford H. Davis, petitioner, to vacate sentence pursuant to 28 U.S.C., Section 2255 having been presented to the Court together with the response of the United States, the traverse thereof, and upon supplementary briefs filed by both petitioner and respondent, and upon examination of the records and files of said cause, the court is of the opinion that the pleadings, records and files conclusively show that the petitioner is not entitled to any relief and that the court need not conduct an evidentiary hearing for the reasons set forth in Memorandum Opinion this date issued; it is

ORDERED

That the motion of Clifford H. Davis to vacate sentence be, and the same is hereby, denied.

This the 14th day of June, 1971.

/s/ William C. Keady

Chief Judge

United States District Court

This the 14th day of June, 1971.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

WESTERN DIVISION

CLIFFORD H. DAVIS,

PETITIONER

VS.

UNITED STATES OF AMERICA,

RESPONDENT

WC-712-K

NOTICE OF APPEAL—filed July 7, 1971

Notice is hereby given that, *Clifford H. Davis* petitioner aboved named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the order denying petitioner *Motion to Dismiss Indictment* pursuant to 28 USCA. Section 2255 and all order entered thereon entered in these proceeding on the 14th day of June and the 23th day of June 1971.

Respectfully Submitted

/s/ Clifford H. Davis

CLIFFORD H. DAVIS-Pro-Se

P.M.B. 92164-131

Leavenworth, Kansas 66048

Dated:

July 2, 1971

00

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

v.

CLIFFORD H. DAVIS
WILLIAM MOORE PEGRAM
VERN MAC THOGMARTIN

CRW 6835

MOTION ON BEHALF OF DEFENDANT
CLIFFORD H. DAVIS FOR NEW TRIAL

Comes the defendant, Clifford H. Davis, and respectfully moves the Court to grant him a new trial for the following reason:

1.

The Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.

2.

The verdict is contrary to the weight of the competent evidence.

3.

The verdict is not supported by substantial evidence.

4.

The Court erred in not sustaining objections made by defendant to the introduction of the evidence consisting of the various items of property removed by the officers from the van truck testified to by numerous witnesses in the trial.

5.

The Court erred in not sustaining the objections of defendant to the testimony and evidence offered and introduced by the United States, showing William Moore Pegram's and Vern Mac Thogmartin's connection with the

alleged bank burglary as it served only to prejudice defendant Clifford H. Davis.

6.

The Court erred in admitting in evidence the clothing and personal effects of defendant Clifford H. Davis, as same were secured from the defendant without authority or law. The Court further erred in admitting into evidence the particles of metal, brick, mortar and paint and other debris allegedly found in the clothing of defendant Clifford H. Davis, and all testimony in reference to the analysis thereof and opinions based upon the said analysis for the reason that same were secured from the clothing of defendant without authority in law.

7.

The Court erred in charging the jury and in refusing to charge the jury as requested.

8.

It was prejudicial error for the United States to stop defendant's attorney in arguing that the witness Highway Patrolman Inspector Warren admitted that he had given contradictory testimony in a state hearing immediately following the alleged bank burglary. It was further prejudicially wrong for the Court to direct the attorney for the defendant to argue to the jury only briefly on this point.

9.

The Court erred in denying defendant's motion for exclusion of the testimony and evidence offered by the United States at the conclusion of the evidence.

/s/ Paul M. Moore

PAUL M. MOORE

P. O. Box 230

Calhoun City, Mississippi

Attorney for Defendant

CERTIFICATE OF SERVICE (omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF MISSISSIPPI—WESTERN DIVISION

UNITED STATES OF AMERICA

v.

CLIFFORD H. DAVIS
WILLIAM MOORE PEGRAM
VERN MAC THOGMARTIN

Cause No. CRW6835

MOTION TO QUASH INDICTMENT AND
DISCHARGE DEFENDANT
CLIFFORD H. DAVIS

Comes now Clifford H. Davis, one of the defendants in the above entitled and numbered cause, by and through his Attorney, Paul M. Moore, and respectfully moves the Court to quash and vacate the indictment returned against him, as to both counts thereof, and assigns as reasons therefor the following:

That on November 7, 1967, and at the time it is alleged in the indictment that the criminal acts allegedly performed by defendant, Clifford H. Davis, that the said defendant, Clifford H. Davis, was arrested by one Jesse M. Ash, Sheriff of Marshall County, Mississippi. That the said arrest was made by the said Jesse M. Ash in Hickory Flat, County of Benton, Mississippi, and without being armed with a warrant. That at the time of said arrest of this defendant, the said Jesse M. Ash was without any legal authority as he was outside the county of his authority and jurisdiction. That at said time the said Jesse M. Ash had no legal knowledge that a felony or any crime had been committed. That the defendant, Clifford H. Davis, committed no crime, either a felony or a misdemeanor, in the presence of said Jesse M. Ash, and that at the time of the said arrest there was no reasonable cause for the said Jesse M. Ash to make the arrest of the defendant, Clifford H. Davis. That there was then no charge made against defendant Clifford H. Davis, based on reasonable grounds, or otherwise, that Clifford H. Davis had committed a felony. That the only information the said Jesse M. Ash had at said time was derived from a

telephone conversation with an unknown party; said unknown party allegedly having gained information based on radio information, and this did not constitute reasonable cause for making arrest of this defendant, Clifford H. Davis.

That the initial arrest and apprehension of this defendant, Clifford H. Davis, being illegal and in violation of the 4th and 14th Amendment to the Constitution of the United States, and he having been held in violation of his constitutional and due process rights, all subsequent information, evidence, testimony accumulative and secured being tainted and in violation of due process could not and cannot be used against said defendant Clifford H. Davis. That upon information and belief, defendant alleges that the basis of the indictment against this defendant, Clifford H. Davis, grows entirely subsequent to and as a result of the said illegal and unauthorized arrest.

WHEREFORE, defendant Clifford H. Davis, says respectfully that said indictment should be set aside and quashed and defendant, Clifford H. Davis, discharged in the premises.

Respectfully submitted,

/s/

Attorney for Clifford H. Davis

I, Paul M. Moore, Attorney for defendant Clifford H. Davis, do hereby certify that I have this day mailed a true copy of the attached and foregoing motion to Honorable H. M. Ray, United States Attorney, postage prepaid, United States Mail, at his address of Oxford, Mississippi 38655.

This the — day of March, 1968.

/s/

Attorney for Clifford H. Davis

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2547

Summary Calendar *

CLIFFORD H. DAVIS,

PETITIONER-APPELLANT,

VERSUS

UNITED STATES OF AMERICA,

RESPONDENT-APPELLEE.

*Appeal from the United States District Court for the
Northern District of Mississippi*

(January 20, 1972)

Before BELL, AINSWORTH and GODBOLD,
Circuit Judges.

PER CURIAM: Clifford H. Davis appeals from the denial by the District Court of his motion to vacate sentence pursuant to 18 U.S.C. § 2255. We affirm.

Appellant was indicted by a federal grand jury sitting in Greenville, Mississippi, on January 30, 1968, for bank robbery in violation of 18 U.S.C. § 2113(a). He was tried by a jury, convicted and sentenced to serve fourteen years. We affirmed on direct appeal. See *Davis v. United States*, 5 Cir., 1969, 409 F. 2d 1095.

Appellant, a Negro, alleges for the first time in his 2255 petition that his sentence should be set aside on grounds of systematic exclusion of Negroes from the grand jury which

* Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al.*, 5 Cir., 1970, 431 F. 2d 409, Part I.

indicted him. The District Court correctly found that appellant's failure to raise the objection timely by pretrial motion, pursuant to Rule 12(b) (2), Fed. R. Crim. P., constituted a waiver of that objection, and in the absence of any extraordinary or prejudicial circumstances, appellant was not entitled to the relief sought. See *Shotwell Manufacturing Co. v. United States*, 371 U.S. 341, 83 S.Ct. 448 (1963); *Pinkney v. United States*, 5 Cir., 1967, 380 F. 2d 882; *Jackson v. United States*, 5 Cir., 1968, 394 F.2d 114; *Brooks v. United States*, 5 Cir., 1969, 416 F. 2d 1044; *Bustillo v. United States*, 5 Cir., 1970, 421 F. 2d 131; *Throgmartin v. United States*, 5 Cir., 1970, 424 F.2d 630.

There is no merit to appellant's additional contention that his constitutional rights were infringed because an assistant to his counsel, a senior law school student, was not allowed to confer with him in prison.

AFFIRMED.

(January 30, 1972)

Appellant, a Negro, alleges for the first time in his 3232 petition that his sentence should be set aside on grounds of systematic exclusion of Negroes from the grand jury which

Rule 18.5 Cir. 1970, 411 F. 2d 1005, 1006. We affirmed on direct appeal. See *Brooks v. United States*, 5 Cir., 1969, 416 F. 2d 1044.

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

OCTOBER TERM, 1971

No. 71-2547

Summary Calendar

D. C. Docket No. CA-WC-71-2

CLIFFORD H. DAVIS,

PETITIONER-APPELLANT,

VERSUS

UNITED STATES OF AMERICA,

RESPONDENT-APPELLEE.

**Appeal from the United States District Court for the
Northern District of Mississippi**

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed.

January 20, 1972

Issued As Mandate: Mar. 6, 1972

IN THE
**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 71-2547

CLIFFORD H. DAVIS,
PETITIONER-APPELLANT,

versus

UNITED STATES OF AMERICA,
RESPONDENT-APPELLEE.

*Appeal from the United States District Court for the
Northern District of Mississippi*

(February 25, 1972)

ON PETITION FOR REHEARING

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and number cause be and the same is hereby **DENIED.**

¹ We have considered appellant's contention on petition for rehearing that an original file was missing and it was "therefore utterly impossible for the Court to obtain or read a mystical file in its entirety (sic) between January 1971, and May 1971, when they were lost in its entirety in June 1968." He maintains, therefore, that the District Judge was in error in rejecting his contention that an oral motion was made by counsel on his behalf challenging the array of the Grand Jury ten minutes prior to jury trial. We have difficulty understanding appellant's contention. Nevertheless, we have carefully examined all of the files, record and supplementary records, as well as the transcript of testimony in this matter. There is no mention therein of a motion, oral or written, challenging the Grand Jury array. The contention is raised for the first time, in this Section 2255 proceeding. The files show that subsequent to the denial by the District Court of the Section 2255 petition and subsequent to Davis' appeal therefrom, the United States Attorney was granted

leave to modify the record on appeal by filing true copies of original motions by Davis for a new trial and to quash indictment because of alleged illegality of arrest, which original motions were missing from the file. Neither motion refers in any way to the composition of the Grand Jury. These instruments were before the District Judge and considered by him in denying the writ as shown by the following excerpt from his memorandum opinion:

"Petitioner claims that an objection to the composition of the grand jury was made by oral motion of petitioner's attorney and denied by the court before trial in open court on May 6, 1968, the day on which petitioner's trial commenced. He contends, therefore, that there could be no waiver under Rule 12(b)(3) since a proper motion was made before trial. The Court recalls no such oral motion having been made. In order to avoid any possible oversight injurious to the rights of petitioner, the court has read in full the transcript of the proceedings at every stage of petitioner's prosecution and has read the entire jacket file, including docket entries. These voluminous records reveal that not the slightest reference was made to the composition of the grand jury either by petitioner or by his attorney at any stage of the proceedings. Petitioner's attorney did file, on March 6, 1968, a motion to quash the indictment on the ground that the arrest of petitioner was illegal, and that the indictment of the grand jury based upon evidence obtained pursuant to such alleged illegal arrest was void. No reference was made in that motion to the composition of the grand jury. The motion to quash was denied by the court prior to the commencement of trial on May 6, 1968. The substance of that motion was also the substance of the appeal to the Fifth Circuit. *Davis v. United States*, supra. Moreover, petitioner was present at his arraignment on March 21, 1968, at which time his attorney requested and was allowed a period of thirty days within which to file additional pretrial motions. See Rule 12(b)(3) FRCrP. The transcript also reveals that petitioner was present when the motion to quash the indictment on the ground of the alleged illegal arrest was submitted to and denied by the court. The court finds, therefore, that petitioner did not object to the composition of the grand jury prior to trial and did not raise such an objection at any other stage of the proceedings, including his trial, motion for new trial, appeal, nor in his various post conviction motions, until the filing of the petition now before the court."

The contentions of appellant are without merit.

SUPREME COURT OF THE UNITED STATES

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-6481

CLIFFORD H. DAVIS,

PETITIONER,

v.

UNITED STATES

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

OCTOBER 10, 1972